No. 17-55435

IN THE

United States Court of Appeals for the Ninth Circuit

JOHN DOE, I, et al.,

Plaintiffs - Appellants,

v.

NESTLÉ S.A.; NESTLÉ USA, INC.; NESTLÉ IVORY COAST; CARGILL INCORPORATED COMPANY; CARGILL COCOA; CARGILL WEST AFRICA, S. A.; ARCHER DANIELS MIDLAND COMPANY,

Defendants - Appellees.

From the United States District Court for the Central District of California
Case No. 2:05-cv-05133-SVW-MRW
The Honorable Stephen V. Wilson

SUPPLEMENTAL BRIEF OF NESTLÉ USA, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Nestlé USA, Inc. hereby files its corporate disclosure statement as follows. Defendant-Appellee Nestlé USA, Inc. is a wholly owned subsidiary of Nestlé Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé S.A., a publicly traded Swiss corporation, the shares of which are traded in the United States in the form of American Depositary Receipts. No other publicly traded company has a 10% or greater ownership stake in Nestlé USA, Inc.

Dated: May 18, 2018

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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PRELIMINARY STATEMENT

Nestlé USA, Inc. ("Nestlé USA"), respectfully submits this supplemental brief pursuant to the Court's April 25, 2018 Order for briefing on "(1) the impact of *Jesner v. Arab Bank PLC*, No. 16-499, [138 S. Ct. 1386] (Apr. 24, 2018), on the disposition of this case; and (2) any other issue properly before this Court."

Jesner provides further confirmation that this case was properly dismissed by the district court. In *Jesner*, the Supreme Court held that foreign corporations cannot be subject to liability under the ATS. It grounded its decision on its "general reluctance to extend judicially created private rights of action," a concern with particular salience "in light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation." *Jesner*, 138 S. Ct. at 1402-03. The Court's experience with the ATS showed that "foreign corporate defendants create unique problems" and that permitting such suits promoted "the opposite" of the ATS's original intent "to promote harmony in international relations." *Id.* at 1406-07.

The reasoning in *Jesner* also sheds light on several other important issues in ATS litigation: The Court reinforced the "perils" of permitting any ATS suit that has only tenuous links to the United States. *Id.* at 1406. It also cast extreme doubt on the ability to impose ATS liability on *any* corporate defendant, *see, e.g.*, *id.* at 1408 (opinion of Kennedy, J.); *id.* at 1410-11 (opinion of Alito, J.), and emphasized

the need to dispose of ATS suits as quickly as possible, rather than permitting remands that might inappropriately perpetuate costly litigation, *id.* at 1399.

These key points bear directly on why dismissal was necessary and proper in Nestlé USA's case. *First*, Plaintiffs' already improper group pleading is now doubly barred, in light of *Jesner's* prohibition on ATS foreign corporate liability. Plaintiffs' theory of liability hinges on allegations pertaining to Nestlé USA's *Swiss*-based parent, Nestlé S.A., and its Ivorian affiliate, Nestlé Côte d'Ivoire. Plaintiffs' Second Amended Complaint repeatedly treats these two companies, along with Nestlé USA, as one. Plaintiffs' reply brief doubles down on this evasive pleading by trying to renew long ago dismissed alter-ego and agency theories that seek to hold Nestlé USA liable for the alleged conduct of Nestlé S.A. While Nestlé USA already established that this violated basic pleading standards, *Jesner* now prohibits this argument for a second reason: it is an attempt to impose ATS liability on a foreign corporation.

Second, *Jesner*'s emphasis on judicial caution and restraint confirms the impropriety of recognizing an ATS cause of action for the exceptionally broad form of aiding and abetting liability that Plaintiffs advocate. Plaintiffs assert that aiding and abetting liability may be established based on the sort of ordinary business activities alleged in the SAC, but that claim has no sound basis in international law, and Plaintiffs' cases do not remotely suggest otherwise. That is all the more so

because the justices in *Jesner*'s majority expressed particular concerns regarding the recognition of an ATS action that might discourage foreign investment or override a congressional scheme designed to address a particular problem. Permitting ATS liability in this case would do both.

Third, while *Jesner* did not reach the question of extraterritoriality, its emphasis on the foreign policy concerns implicated by ATS suits reinforces the need to narrowly construe the "focus" inquiry articulated in *Kiobel* and *RJR Nabisco v. European Community*. Plaintiffs spent much of their Reply Brief denying that this "focus" inquiry even applies. That they are fighting so hard against *RJR*'s embrace of the "focus" test only shows that Plaintiffs do not believe that the SAC's allegations satisfy that standard.

Fourth, while the *Jesner* majority did not need to reach the question because that case involved a *foreign* corporate defendant, all five justices in the majority strongly suggested that ATS liability is also foreclosed for *domestic* corporations. *Jesner* thus suggests revisiting this Court's precedent on corporate liability.

Finally, in keeping with *Jesner*'s emphasis on prompt dismissal of improper ATS suits, the proper result here is affirmance, not remand. Nestlé USA's Answering Brief explained fully why Plaintiffs have not stated a domestic application of the ATS; *Jesner* merely adds additional grounds on which this Court can affirm. Nestlé USA has been litigating this case now for 13 years, and the courts

have given Plaintiffs multiple attempts to plead a viable ATS claim against Nestlé USA. Plaintiffs have not done so, and that should be the end of the matter.

ARGUMENT

I. Plaintiffs Cannot Hold Nestlé USA Liable For Alleged Acts Taken By Foreign Affiliates That Have No ATS Liability.

Plaintiffs' group-pled complaint, which seeks to treat distinct corporate activity interchangeably and blurs the lines between foreign parent companies and U.S.-based subsidiaries, was already improper under Rule 8. *See* Answering Br. 26-30. But under *Jesner*, Plaintiffs' SAC should be dismissed for the additional reason that Nestlé S.A. and Nestlé Côte d'Ivoire have no liability under the ATS, and allowing Plaintiffs to impute their conduct to Nestlé USA would work an end-run around the Supreme Court's central holding that foreign corporations have no ATS liability. When the law precludes liability for a certain class of entities, this Court has rejected "creative pleading" that would "render … immunity provisions meaningless." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265, 1269 (9th Cir. 2016) (rejecting Plaintiffs' attempt to hold otherwise immune providers of interactive computer services liable for internet content through "cryptic[]" allegations that the provider created content). But that is precisely what Plaintiffs attempted to do.

As Plaintiffs' SAC and appellate briefing make clear, their entire suit against Nestlé USA requires the Court to hold Nestlé USA accountable for the alleged conduct of its foreign affiliates, including its Swiss parent, Nestlé S.A. and Nestlé

Côte d'Ivoire. This Court should not allow Plaintiffs to plead around *Jesner*'s absolute bar on foreign-corporate ATS liability by using a suit against Nestlé USA to impose liability for the alleged conduct of two foreign affiliates that were never served and that were dismissed from this case in Plaintiffs' prior appeal, Answering Br. 6, 11 n.4.

"Creative pleading" is on full display in the SAC. It does not clarify what, if anything, Plaintiffs believe Nestlé *USA* has done: Nestlé USA appears in only 3 of the SAC's 101 paragraphs, E.R. 133, 138, 143 (SAC ¶¶ 1, 20, 35), and many of the allegations refer explicitly to the conduct of categorically immune foreign corporations Nestlé S.A. and Nestlé Côte d'Ivoire. For example, the SAC refers to several Nestlé S.A. publications regarding its various commitments against forced labor in its supply chain. *See* E.R. 148-51 (SAC ¶¶ 52-57). And the remaining allegations lump together Nestlé USA with Nestlé S.A. and Nestlé Côte d'Ivoire, and with the other named Defendants. *See* Answering Br. 29-30. Moreover, the SAC expressly reveals Plaintiffs' true theory of the case: It alleges that Nestlé USA's "parent entit[y]," Nestlé S.A., "control[s] every aspect of [Nestlé USA's] operations, particularly with respect to the sourcing, purchasing, manufacturing, distribution, and/or retailing of cocoa." E.R. 141 (SAC ¶ 30).

Plaintiffs' Reply Brief further underscores that Plaintiffs' theory of liability requires the Court to improperly impute to Nestlé USA the conduct of its immune

Swiss-based parent. In an attempt to bolster the relevance of the SAC's repeated allegations of Nestlé S.A.'s conduct, Plaintiffs assert that they "have alleged that Nestlé USA was an alter ego of its parent company." Reply Br. 6 n.2. Plaintiffs also seek to distinguish the numerous cases barring group pleading by arguing that "none of the cases on which Nestlé [USA] relies allege an alter ego or agency theory." Reply Br. 12 n.3. Plaintiffs' reliance on the agency and alter ego theory was always deeply problematic because Plaintiffs abandoned those claims when they chose not to appeal the district court's 2010 dismissal of those theories. *See* Answering Br. 11 n.4. But *Jesner* makes it even more obvious that Plaintiffs cannot plead around the deficiencies in their case against Nestlé USA.

Indeed, accepting Plaintiffs' theory of liability here would risk the very harms that *Jesner* sought to avoid: Subjecting foreign corporations to ATS liability "create[s] unique problems"—including possible foreign-policy tension—that "courts are not well suited" to resolve. *Jesner*, 138 S. Ct. at 1407. But this limitation would have little meaning if a plaintiff could sue a U.S. affiliate based on the actions of a foreign corporation not subject to the ATS. Any such litigation would focus on the propriety of the *foreign* corporation's conduct, involve discovery of the *foreign* corporation's documents, and would discouraged investment abroad by the *foreign* corporation. In short, it would force American courts to become entangled in foreign affairs in precisely the way that *Jesner* sought to foreclose.

II. Plaintiffs' Limitless Theory Of Aiding And Abetting Liability Contravenes *Jesner*'s Call To Exercise Caution And Restraint.

Jesner also requires dismissal because Plaintiffs' suit asks this Court to recognize a novel form of aiding and abetting liability that would permit corporations to be sued based on ordinary business activities. All five of the Justices in the *Jesner* majority agreed that—at a minimum—"federal courts must exercise 'great caution' before recognizing new forms of liability" using federal common law. *Jesner*, 138 S. Ct. at 1403. Justice Kennedy's plurality opinion separately recognized that courts should defer to Congress and decline to extend the ATS when there is "sufficient doubt" whether a norm of international law applies to the given fact pattern. *Id.* at 1402 (opinion of Kennedy, J.).

Permitting Plaintiffs' claim against Nestlé USA would be the opposite of restraint—indeed, it would create a cause of action based on a theory of aiding and abetting liability that is much broader than the one that is universally accepted under international law. That was already plainly improper under *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), which made clear that courts may not recognize a cause of action unless it is based on a norm of international law that is "specific, universal, and obligatory." *Id.* at 732. *Jesner* confirms that *Sosa*'s restrictions must be tightly enforced; recognizing the cause of action here would flout that command.

Plaintiffs' aiding and abetting claim hinges principally on allegations that "Nestlé" or "Defendants" undertook activities routinely performed by a company with a transnational supply chain: They made decisions to purchase agricultural inputs to their confectionary products (here, cocoa), provided funding and training to the farmers who produced that cocoa "to grow the quality and quantity of cocoa beans [Defendants] desire[d]," and maintained corporate policies *against* forced labor in their supply chains. *See* E.R. 144, 150-51 (SAC ¶¶ 37-38, 57). The district court correctly rejected Plaintiffs' effort to transform "activities that ordinary international business engage in" into aiding and abetting liability. E.R. 8. Any contrary ruling would expose U.S. corporations to liability simply for purchasing raw inputs from troubled areas of the world, subjecting them to costly litigation when they cannot themselves stop all human rights abuses in those areas.

This capacious view of aiding and abetting certainly is not compelled by any of the international law cases Plaintiffs cite. In their Reply Brief, at pages 14-15, Plaintiffs purport to identify cases showing that "decision-making, providing financial support, and providing training is sufficient to constitute aiding and abetting" but none of those cases involved the banal acquisition of commercial or agricultural goods. The Rwandan example, *Prosecutor v. Bagaragaza*, did not even involve an adjudication of liability, but rather an agreed-to guilty plea. Case No. ICTR-2005086-S, Sentencing Judgment, ¶¶ 24-26 (Nov. 17, 2009). And even then,

the defendant was not convicted solely because he "provi[ded] money for the purpose of buying alcohol to motivate genocide," as Plaintiffs claim. Reply Br. 14. Bagaragaza also participated in a meeting to plan "attacks against members of the Tutsi ethnic group" and provided "vehicles and fuel … used to transport members of the *Interahamwe* for the attacks." *Id.* at ¶ 25. Purchasing cocoa, providing training and farming supplies—while *opposing* forced labor—is a world apart from actively plotting genocide.

As to *United States v. Albert Speer* and *United States v. Erhard Milch*, Plaintiffs curiously omit that both defendants were high ranking Nazi officials. *See* Reply Br. 14-15. Speer was Reich Minister for Armaments and Munitions, while Milch was a Luftwaffe Field Marshal who, along with Speer, ran the Central Planning Board where both men "allocate[d]" slave laborers to various locations where those slaves would work in furtherance of Germany's war effort. *Speer*, 1 Trial of the Major War Criminals before the International Military Tribunal 331 (1947)[1]; *Milch*, 2 Trials of War Criminals before the Nuremberg Military Tribunals under Counsel Law No. 10 at 815-16 (1947).[2] Again, the gulf between these Nazi war criminals and a company that purchases cocoa is so great that the cases cannot

[1] https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

[2] https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf.

possibly support the broad theory of aiding and abetting liability that Plaintiffs advance, particularly given *Jesner*'s call for caution and restraint.

Moreover, the justices in the *Jesner* majority expressed two specific concerns that counseled against the acceptance of Plaintiffs' aiding and abetting theory. *First*, Justice Kennedy emphasized that courts should consider the consequences for foreign investment before recognizing liability under the ATS. He cautioned against "establish[ing] precedent that discourages American corporations from investing abroad," depriving developing companies of foreign investment "that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (Kennedy, J.). That is exactly what will occur if Plaintiffs' theory carries the day. If routine business activities are deemed sufficient to establish aiding and abetting liability, companies will be wary to do any business in regions troubled by human rights issues. *See* Answering Br. 52-55. That, in turn, will deprive developing nations of the resources needed to improve those conditions.

Second, all of the justices in the majority emphasized that Congress take the lead in deciding how to approach sensitive international issues like child slavery in the Côte d'Ivoire. And Justice Kennedy stated that Plaintiffs should not be permitted to use the ATS to "bypass Congress's express limitations on liability." *Jesner*, 138 S. Ct. at 1405. Again, that is precisely what Plaintiffs seek to do. Their Reply Brief (at 7) points to two laws: one statute prohibiting entry of goods produced through

forced labor, 19 U.S.C. § 1307, and a provision of the Trade Facilitation and Trade Enforcement Act of 2015 requiring U.S. Customs and Border Protection to submit annual reports to Congress regarding excluded merchandise, Pub. L. No. 114-125, § 910(b), 130 Stat 122, 240-41. But *neither* provision includes a private civil action, still less do they permit a civil action based only on allegations of routine business conduct like the ones put forward by Plaintiffs. The laws Plaintiffs cite are "part of a comprehensive statutory and regulatory regime" and "[i]t would be inappropriate for courts to displace this considered regulatory and statutory structure." *Jesner*, 138 S. Ct. at 1405 (Kennedy, J.).[3]

In *Jesner*, the Supreme Court reiterated that judicial extension of ATS civil suits is fraught with implications for U.S. foreign policy and the separation of powers. The best course, as Justice Gorsuch explained, is "the wisdom of restraint." *Jesner*, 138 S. Ct. at 1414. This Court should reject Plaintiffs' theory that allegations of ordinary business conduct are sufficient to state an ATS claim. Indeed, because "there is no general presumption that [a] plaintiff may also sue aiders and abettors," *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164,

[3] Plaintiffs' reliance on Section 1307 is particularly flawed because their claims are based on alleged violations that occurred 1994-2001, when Section 1307's provisions *did not apply* where the product was "not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States." 19 U.S.C. § 1307 (2001 ed.).

182 (1994), *Jesner*'s emphasis on restraint in federal common lawmaking demonstrates that courts should not even recognize aiding and abetting under the ATS at all.

III. *Jesner* Reaffirms the Need to Dismiss ATS Suits Predicated Primarily on Foreign Conduct.

Because *Jesner* held that ATS suits cannot be brought against foreign corporations, the Court declined to rule on extraterritoriality. 138 S. Ct. at 1388-89. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), therefore remains the most recent, explicit guidance on extraterritoriality. *RJR* held that the "focus" inquiry from *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), applies equally to ATS suits, such that a plaintiff may overcome the extraterritoriality bar only by alleging that the conduct relevant to the statute's "focus" occurred in the United States. *Id.* at 2093-94. While *Jesner* did not address that holding, its consistent emphasis on the need to consider foreign policy implications of ATS suit corroborates the importance of tightly policing ATS suits to ensure they meet the "focus" test. *See, e.g.*, *Jesner*, 138 S. Ct. at 1407 (recognizing that permitting ATS suits based on "relatively minor connection[s]" with the United States could raise significant foreign relations issues).

In the first seven pages of their Reply Brief argument, Plaintiffs repeatedly contend that *RJR Nabisco*—including the Court's embrace of the "focus" test for

extraterritoriality analysis—is not the governing standard, and that extraterritoriality is instead governed by the "touch and concern" test referenced in a single sentence in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Reply Br. 3-9. As Nestlé USA has already explained, that argument has no merit. *See* Answering Br. 18-25. The *RJR* Court could not have been more clear in holding that "*Morrison* and *Kiobel* reflect [the same] two-step framework for analyzing extraterritoriality issues," the second step of which asks courts to determine "whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" 136 S. Ct. at 2101. Given that *Jesner* did not address extraterritoriality, it obviously did not disturb that dictate and Plaintiffs have not and cannot offer any reason why this Court should ignore the Court's clear command. Nor, as the Answering Brief explained, have they offered any reason why their allegations satisfy the "focus" test.[4]

[4] Of course, Plaintiffs lose even under the "touch and concern" test. Plaintiffs point to Nestlé USA's U.S. citizenship, Reply Br. 5, but that is obviously not remotely sufficient to establish that conduct "touch[es] and concern[s]" the United States. Indeed, that was the position advanced by Justice Breyer in *dissent* in *Kiobel*, and *Jesner* casts extreme doubt on the ability to bring any ATS suits against domestic corporations. *See infra* at 14-15. *Jesner* similarly undermines Plaintiffs' "national interest" arguments, as the legislation cited counsels against recognizing a separate court-made cause of action. *See supra* at 10-11. And Plaintiffs' erroneous assertions that Nestlé USA aided and abetted forced labor from the United States overlap entirely with their failed arguments under the "focus" test. *Compare* Reply Br. 6 *with* Reply Br. 13.

IV. *Jesner* Casts Extreme Doubt on ATS Corporate Liability.

The foregoing discussion, as well as the arguments in Nestlé USA's Answering Brief, provide more than enough reasons to affirm. But *Jesner* provides one further reason to do so: All five of the Justices in the majority expressed views that dictate against recognizing *any* form of corporate liability under the ATS.

Justice Kennedy's plurality opinion (which was joined by both the Chief Justice and Justice Thomas) concludes that there is "sufficient doubt" as to whether international law embraces corporate liability that the question is best left to Congress to resolve. *Jesner*, 138 S. Ct. at 1402. Indeed, the opinion explicitly states that "Congress is in a better position" than the judiciary to determine "whether and how best to impose corporate liability." *Id.* at 1406. Meanwhile, Justice Alito's opinion asserts that courts should decline to create an ATS cause of action "whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife." It then observes that because "customary international law does not require corporate liability, . . . declining to create it under the ATS cannot give nations just cause for complaint against the United States." *See id.* at 1410. In other words, corporate liability is not necessary to "avoid[] diplomatic strife" and therefore is not proper under the ATS. *Id.* And, while Justice Gorsuch did not expressly address the question of corporate liability writ large, there is still no question that he would not recognize an ATS cause of action against domestic corporations. That is

because he asserted that courts "should refuse invitations to create new forms of legal liability" full stop. *Jesner*, 138 S. Ct. at 1412 (Gorsuch, J.).

The numerous other reasons for affirmance mean that this Court need not address the issue of domestic corporate liability in this case. But—if the Court were to somehow look past the additional obstacles to this suit—*Jesner* would then require reconsideration of the Ninth Circuit's corporate liability precedent.

V. This Court Should Affirm.

Jesner is instructive in one final, important way. The *Jesner* Court rejected multiple requests to remand that case to the lower court, explaining that it was improper to "prolong[]" the "the lengthy and costly litigation" ATS litigation when there was a legal ground on which the case could be dismissed. *Jesner*, 138 S. Ct. at 1399. That guidance should govern here if Plaintiffs make any attempt to delay the inevitable by requesting a remand and yet another opportunity to replead.

Litigation must, at some point, end. Plaintiffs first sued in 2005 and have enjoyed two opportunities to amend their complaint. The pre-*Jesner* law provided ample grounds to affirm the district court's dismissal of Plaintiffs' latest complaint, and *Jesner*'s holding and logic only provide additional grounds for affirmance.

CONCLUSION

Nestlé USA respectfully urges this Court to affirm.

Dated: May 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32-1, and the Court's April 25, 2018 Order because it is 15 pages or fewer, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: May 18, 2018

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, undersigned counsel certifies that, to counsel's knowledge, there are no related cases pending in this Court.

Dated: May 18, 2018

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 18, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 18, 2018

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.